



HAWAII CIVIL RIGHTS COMMISSION

830 PUNCHBOWL STREET, ROOM 411 • HONOLULU, HI 96813-5095 • PHONE: (808) 586-8636 • FAX: (808) 586-8655 • TDD: (808) 586-8692

EXCERPTS OF HCRC MINUTES – Granting HEC petition; scheduling public hearing

MINUTES*

Hawai'i Civil Rights Commission Office

April 18, 2006

3:30 p.m.

Present: Coral Wong Pietsch, Lisa Wong, Sara Banks and Les Ueoka, Commissioners; John Ishihara, Bill Hoshijo, Christopher Jones, Shirley Garcia, Staff; Connie Hastert, Clayton Kamida, Prabha Natarajan, Karen Dang, Guests.

Petition for Rule Relief, filed by Hawai'i Employers Council (HEC), Rule Relief Docket No. 06-001

Chair Pietsch turned to the matter of the HEC petition for rule relief.

At this point, a guest placed a portable recorder on the conference table to record the discussion. Chair Pietsch asked the guest to identify herself, and she explained that she was from the Director of Labor's office and was there to record the discussion of the HEC petition, so the Director could consider the discussion and decide whether to support the petition.

Commissioner Les Ueoka asked a question of CC Ishihara: if the Commission decided to go forward with rulemaking and set the proposed rule for public hearing, whether the rule could be revised in light of public testimony. CC Ishihara responded that the Commission could make changes to the proposed rule, but if there were substantial changes a second public hearing would be required.

CC Ishihara distributed an email from former HCRC Chair Amy Agbayani and a letter from former Commissioner Daphne Barbee Wooten, both in opposition to the petition. ED Hoshijo explained that he had informed the four surviving original commissioners of the HEC petition, because the affected rule was promulgated during their term.

The Chair called HEC General Counsel Clayton Kamida (Kamida) to the table to summarize the petitioner's position. Kamida said the proposed rule change had merit for Hawai'i employers, and that Hawai'i law on employer liability for sexual harassment should track federal law. He also suggested that the Commission's decision on the petition for rule relief was not a decision on the merits of the proposal, but only a threshold decision to go forward with the public rulemaking process, allowing the Commission to make a reasoned, informed decision.

HEC's Kamida reviewed the difference between state and federal law. In Hawai'i employers are held liable for supervisor sexual harassment. Under federal law, there is no strict liability, because the U.S. Supreme Court has recognized that employers should not be held strictly liable, based on

* as approved, with corrections, on May 9, 2006.

agency law and the doctrine of avoidable consequences. Kamida said that the majority of states that have decided this issue have followed the federal standard as set out by the U.S. Supreme Court.

Kamida concluded his remarks, referring to the grounds for denying a petition for rule relief: failure to conform to content requirements; frivolous petition; or, insufficient reasons to justify public rulemaking. He concluded that the HEC position was that under U.S. Supreme Court precedent, there was nothing in the Hawai'i statute that required strict liability, and that the rule does not comport with basic legal principles of agency and avoidable consequences, and mitigation of damages. An employee should complain, to prevent future harassment, should have an incentive to complain. Kamida urged that the petition be approved, so all stakeholder could testify in the public hearing process.

Commissioner Ueoka asked Kamida about the state courts that had addressed the issue. Kamida said that 8 state courts had followed the U.S. Supreme Court, and 3 had gone the other way. Commissioner Ueoka asked if any of the courts had broader constitutional provisions or civil rights clauses similar to the Hawai'i constitution. Kamida said that he could not speak to the issue of the scope of other states' constitutional provisions. He said that the Hawai'i constitutional provisions were not controlling, because the equal protection clause limited state action, and it was ratified in 1950, while the fair employment sex discrimination law was not enacted until 1963.

Chair Pietsch asked if there was a need for the change, whether there were many cases in which employers have strict policy and take action, but are still held liable. Kamida said that the defense has been raised in a couple of cases, but there were no court decisions, although it was mentioned in dicta by the Hawai'i Supreme Court in the *Gonsalves* case. He pointed out that the HCRC rules are similar to the old EEOC rules which were deleted after the U.S. Supreme Court decided the *Faragher* and *Ellerth* cases. He added that the empirical evidence showed that the *Faragher* and *Ellerth* decisions resulted in fewer complaints of sexual harassment, citing 15,618 complaints of sexual harassment in 1998 and 12,679 sexual harassment complaints in 2005. This, he said, showed that the federal standard provided incentives for employers to deter sexual harassment.

Commissioner Sara Banks asked if there were cases that "broke the bank" for employers found liable under the current law. Kamida said he knew of no reported cases. Commissioner Banks said she was interested in whether past decisions really penalized employers.

ED Hoshijo responded that one Commission case came to mind, in which an employer was held strictly liable, the Niimi case, which involved sexual assault. ED Hoshijo continued that it was difficult to attribute any impact of the *Faragher* and *Ellerth* decisions on complaint filing data, because trends were affected by many factors, including higher consciousness of the consequences of sexual harassment. He pointed out that sexual harassment still constituted the largest number of sex discrimination complaints filed with the HCRC. He also disagreed that there was a direct connection between provision of an affirmative defense to sexual harassment claims and enactment of effective policies, nothing to show that strict liability served as a disincentive to implementation of such policies and procedures.

ED Hoshijo stated that the Commissioners' decision on the petition for rule relief was a policy decision, not merely a threshold decision to engage in further public discussion. ED Hoshijo said that the HEC's argued the merits of their proposal, but that their position that the Commission

need not decide the merits was not consistent with the rule relief petition process. Once the Commission decides to engage in the rulemaking process, the proposed rule becomes their proposal. The Commission, he argued, had to decide whether to propose the rule change.

ED Hoshijo argued that the current rule was not *ultra vires*, as suggested by the HEC, and that interpretation of the law would be more appropriately decided in the context of a case and controversy, and any major change better addressed in the public forum of the legislative process. He cautioned that the Commission should not open the door to other rule relief challenges in every area that state law was stronger than federal law.

Chair Pietsch asked if the legislature had passed any law expressly making state law stronger than federal law in this area. ED Hoshijo pointed out that the legislature did enact an exception which allowed plaintiffs in sexual harassment cases to file claims directly in court without exhausting administrative remedies, recognizing that it was sometimes difficult for victims of sexual harassment to come forward to file complaints within the 180 day statute of limitations.

Chair Pietsch asked if any Hawai'i Supreme Court decisions addressed the issue of strict liability. Kamida responded that there were no cases on point, only the dicta in the *Gonsalves* decision.

ED Hoshijo expressed concern over the federal standard distinction between cases in which there was a tangible employment action and those where there was none.

Closed Executive Session

The Commissioners came out of closed executive session.

The Commissioners discussed their positions on the petition before voting on it.

Commissioner Ueoka said he would vote to grant the petition to initiate public rulemaking. He felt there was sufficient reason, a policy question – whether the current rule and strict liability encouraged or discouraged employers from implementation of preventative policies and procedures. Commissioner Ueoka said he felt that the Commission needed to explore whether workplace environments have changed since the original rule was promulgated in 1992. It troubled him that sexual harassment cases still constitute the largest number of sex discrimination complaints.

Commissioner Banks said she would vote to deny the petition. Based on her experience, she felt that strict liability was the reason for employers to educate their managers to prevent sexual harassment, forcing employers to do what is right.

Commissioner Wong said she would vote to grant the petition. She explained that things had changed since 1992, and that she was in favor of fair treatment for both employees and employers.

Chair Pietsch said she would vote to grant the petition. She said she wanted to give the rule a hearing, that the petition met all of the requirements and the proposed rule did not give employers a way to avoid responsibility.

By a 3-1 vote, the Commissioners granted the petition. (Pietsch, Wong, Ueoka, yes; Banks, no).

MINUTES

Hawai'i Civil Rights Commission Office

July 27, 2006

3:00 p.m.

Present: Coral Wong Pietsch, Lisa Wong, Sara Banks and Les Ueoka, Commissioners; John Ishihara, Bill Hoshijo, Christopher Jones, Al Lynde, Staff; Connie Hastert, Clayton Kamida, Guests.

Old Business

Rule Making

CC Ishihara reported that the public hearing on the proposed administrative rules had been set for September 29, 2006, from 3 – 7 p.m. in the Ke'elikolani Building third floor training room, Rm. 310. He and Chair Pietsch had met with Director of Labor Nelson Befitel, who offered any needed assistance, including arrangements to keep the office open beyond the normal 4:30 closing time. The notice of the public hearing had been approved by the Attorney General and would be published in newspapers throughout the state. The statute required that the notice be published two times, at least thirty days before the public hearing.

CC Ishihara said the notice of public hearing and the proposed rule changes would also be posted on the HCRC website.

ED Hoshijo reported that he had asked for an initial informal feedback from a University of Hawai'i law professor with expertise in administrative law, on the questions relating to the Executive Director's and enforcement staff's role in the public hearing process, and how the Commission should treat input from staff. He said that the law professor said she would recommend that the Commissioners direct staff to submit its input, which the Commissioners could either make public or not, rather than have staff offer testimony.

Chair Pietsch said she preferred to have the Attorney General address the questions regarding staff role and input, and the Commissioners directed CC Ishihara to seek an informal opinion.